STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK F. FRANKLIN,

Defendant-Appellant.

UNPUBLISHED
June 13, 2000

No. 212129
Wayne Circuit Court
LC No. 97-009404

Before: Cavanagh, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316(1); MSA 28.548(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and felony firearm. He was sentenced to twenty-two to sixty years' imprisonment for the second-degree murder conviction to be served consecutive to a two-year term for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

Defendant argues that the trial court erred in denying his motion to suppress a statement he involuntarily gave to the police. We disagree. We review a trial court's decision on a motion to suppress evidence on legal grounds for clear error. *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996). When reviewing a trial court's determination of voluntariness, we are required to examine the entire record and make an independent determination. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998); *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). Although engaging in de novo review of the entire record, the reviewing court must give deference to the trial court's assessment of the weight of the evidence and credibility of the witnesses. *People v Cheatham*, 453 Mich 1, 29-30 (Boyle, J.); 551 NW2d 355 (1996); *Howard, supra*. The trial court's findings will not be disturbed unless they are clearly erroneous. *Id*. We look to the totality of the circumstances to determine whether a defendant's statement was voluntary. *Sexton, supra* at 66.

Defendant contends that the statement he gave the police was unfairly admitted at trial because he was under the influence of prescribed pain medication and in extreme physical pain during his interview with the police[1] and had been repeatedly questioned by sophisticated police detectives during

his incarceration. At defendant's *Walker*[2] hearing, Detroit Police Officer Samuel Quick testified that he interviewed defendant at 8:30 p.m. on October 29, 1997, regarding the circumstances that led to the victim's death four weeks prior. According to Officer Quick, he advised defendant of his constitutional rights and defendant signed a constitutional rights form. Defendant did not appear to be under the influence of any narcotics. He was coherent and did not have trouble understanding Officer Quick. Defendant was not deprived sleep, food or medicine prior to the interview. During the interview, defendant claimed he approached the victim, fired a gun once into the air and fired a second shot "in the direction of the [victim]." Officer Quick testified that he wrote out defendant's statement, defendant read what Officer Quick had written, initialed each page, and signed the statement. Defendant testified at the hearing that he signed a waiver of rights form and initialed each page of the statement recorded by Officer Quick. However, defendant claimed he was "disoriented" during the interview due to the pain medication he was prescribed. As a result, he did not remember Officer Quick explaining the constitutional rights form. He claimed that he signed the statement without reading it carefully. Defendant also claimed he was questioned at length regarding the incident earlier in the day by other officers. Defendant denied telling Officer Quick that he fired the gun at the victim. The trial court found that defendant made the statement to the police voluntarily[3] and ruled that whether any portion of the statement was fabricated by the police was for the jury to decide.

Upon consideration of all the circumstances, our independent review of the record reveals that the trial court did not clearly err in finding defendant's statement to the police was made voluntarily. *Howard, supra*. Officer Quick was aware defendant had previously been shot; however, defendant did not appear to be under the influence of drugs and was coherent during the interview. Although defendant claims he was "disoriented," we give deference to the trial court's assessment of the witnesses' credibility. *Id*. There is no evidence defendant was physically coerced by Officer Quick or that prior questioning by other officers had any coercive affect on the statement defendant gave to Officer Quick. Defendant does not claim to have requested an attorney during the interview and he admits he voluntarily signed the statement that was written out by Officer Quick. Under these circumstances, the trial court did not clearly err in denying defendant's motion to suppress the statement. *McElhaney, supra*.

Defendant also argues there was insufficient evidence to support his conviction for second-degree murder. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). We must not interfere with the role of the jury to weigh the evidence and determine the credibility of testimony. *Wolfe, supra* at 514-515. To prove second-degree murder, the prosecution must prove the following elements: (1) a death; (2) caused by an act of the defendant; (3) with malice; (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Here, defendant only challenges the sufficiency of the evidence supporting the second element, whether defendant caused the victim's death.

Defendant contends there is insufficient evidence he fired the gun in the direction of the victim. However, Aquan Jones testified at trial that defendant approached the victim with a .22 caliber handgun after the victim threatened to call the police to report that an acquaintance of defendant stole her car. According to Jones, defendant fired the gun once into the air and, as the victim attempted to flee, defendant fired a second shot in the direction of the victim. Within his statement to the police,[4] defendant admitted he fired a shot in the direction of the victim and the victim fell to the ground. In addition, a letter defendant wrote to the trial judge that was admitted at trial states defendant "shot once in the air and then paused and I shot another about 10 feet away from where she was running." Despite evidence suggesting an acquaintance of defendant known as Pee Wee was given the gun after defendant fired the shots and also shot the victim, the prosecution presented sufficient evidence to allow the jury to reasonably infer that defendant, in fact, caused the death of the victim with malice and without justification or excuse.[5] The elements of an offense may be proved by circumstantial evidence and reasonable inferences arising from the evidence. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). "[T]he prosecution need not negate every reasonable theory of innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence is presented." *People v Fetterley*, 229 Mich App 511, 517; 583 NW2d 199 (1998). Accordingly, there was sufficient evidence to support defendant's conviction for second-degree murder.

Defendant's final argument challenging the proportionality of his sentence is also without merit. We review a trial court's sentencing decision for an abuse of discretion. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). A sentence constitutes an abuse of discretion when it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *Rice, supra*. In the present case, defendant was sentenced within the sentencing guidelines range of 10 to 25 years' imprisonment and, thus, his sentence is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Defendant's youth[6] and purported interest in attending college do not constitute unusual circumstances sufficient to overcome the presumption of proportionality. See *Milbourn, supra* at 661; *McElhaney, supra* at 286. Further, the circumstances of the crime are such that the trial court did not abuse its discretion in sentencing defendant at the high end of the guidelines range. Defendant admittedly possessed the gun and fired two shots. While defendant suggested below that he did not shoot the victim or shot the victim by accident, the overwhelming evidence suggests defendant approached the victim when it became apparent she was calling the police and shot the victim as she attempted to flee. Defendant had a prior felony conviction for carrying a concealed weapon. Given these circumstances and the objectives of reforming the offender, protecting society, punishing the offender and deterring commission of similar offenses, *Rice, supra* at 446, defendant's twenty-two to sixty year sentence for second-degree murder is proportionate. Accordingly, the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Brian K. Zahra

[1] Defendant was shot in both legs the same night the victim was killed. According to defendant, his injuries resulted from an incident unrelated to the victim's death.

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[3] We find without merit defendant's claim that the trial court failed to consider the fact that he was on prescribed pain medication, in extreme physical pain and subject to repeated questioning by other officers in analyzing the voluntariness of the statement. The record of the *Walker* hearing indicates the trial court considered all of the circumstances defendant claimed were coercive in deciding the motion and did not base its ruling solely on defendant's testimony that he voluntarily signed the statement.

[4] As discussed, *supra*, the trial court did not clearly err in denying defendant's motion to suppress that statement.

[5] The medical examiner's testimony that the cause of the victim's death was "multiple gun shot wounds to the head" does not alter our conclusion. There was evidence the victim was shot once in the back of the head and twice in the temple region. Thus, there is sufficient evidence from which to infer the shot defendant fired in the direction of the fleeing victim hit the victim in the back of the head and caused her death. See *People v McKenzie*, 206 Mich App 425, 430-431; 522 NW2d 661 (1994) (where the defendant deliberately set in motion a series of events which she knew would negatively affect the victim, there was sufficient evidence of murder despite evidence of an intervening cause of the victim's death); see also *People v Stewart (On Remand)*, 219 Mich App 38, 41; 555 NW2d 715 (1996) (a defendant must be a proximate cause of the victim's death to be convicted of manslaughter).

[6] A sentencing court is not required to tailor a defendant's sentence to account for his age. *People v Lemons*, 454 Mich 234, 258; 562 NW2d 447 (1997).